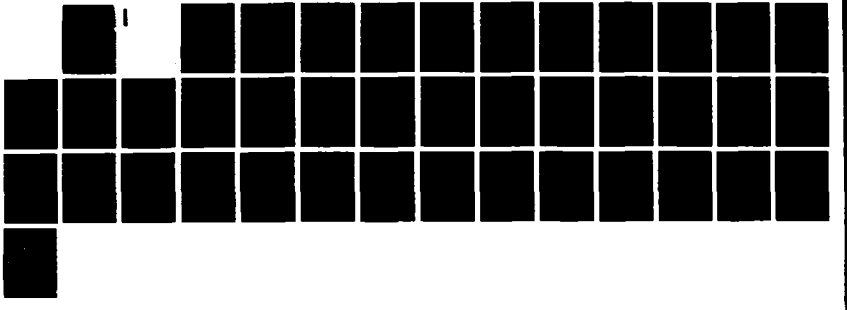
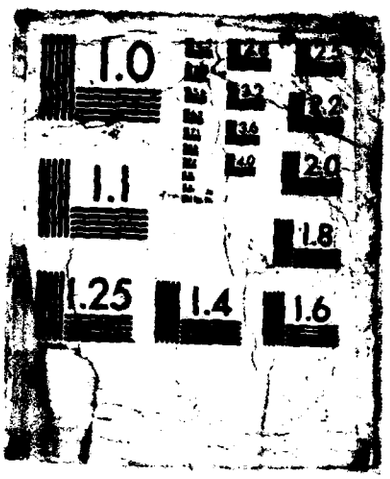
AD-A191 501 COMMANDERS STAFF JUDGE ADVOCATES AND THE ARMY CLIENT 1/1
(U) ARMY WAR COLL CARLISLE BARRACKS PA D F COUPE
23 MAR 88

UNCLASSIFIED F/G 5/5 NL




1.0
1.1
1.25
1.4
1.6
1.8
2.0

USAWC MILITARY STUDIES PROGRAM PAPER

# COMMANDERS, STAFF JUDGE ADVOCATES AND THE ARMY CLIENT

An Individual Study Project
Intended for Publication

by

Colonel Dennis F. Coupe

Colonel William G. Eckhardt, JAGC
Project Adviser

U.S. Army War College
Carlisle Barracks, Pennsylvania 17013
23 March 1988

## ABSTRACT

AUTHOR: Dennis F. Coupe, COL, JAGC

TITLE: Commanders, Staff Judge Advocates and the Army Client

FORMAT: Individual Study Intended for Publication

DATE: 23 March 1988 PAGES: 34 CLASSIFICATION: Unclassified

Newly published Army Rules of Professional Conduct for Lawyers provide ethical guidance and direction for lawyers in military proceedings. The new Rules are the first ever published specifically pertaining to the ethical conduct of military and civilian lawyers practicing in military proceedings. Included in the Rules is a clarification of the ultimate ethical duty of staff judge advocates to the Army and the governmental client, a duty that is superior to duties owed to immediate commanders. Nevertheless, local commanders are entitled to the same full confidentiality and protection as the Army, so long as they perform official acts lawfully and no conflict of interest arises. By clarifying the proper relationship among staff judge advocates, commanders and the Army client, the Rules strengthen professionalism among the parties.

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

| REPORT DOCUMENTATION PAGE | | READ INSTRUCTIONS BEFORE COMPLETING FORM |
|---|---|---|
| 1. REPORT NUMBER | 2. GOVT ACCESSION NO. | 3. RECIPIENT'S CATALOG NUMBER |
| 4. TITLE (and Subtitle)<br>Commanders, Staff Judge Advocates and the Army Client | | 5. TYPE OF REPORT & PERIOD COVERED<br>Individual Study Project<br>6. PERFORMING ORG. REPORT NUMBER |
| 7. AUTHOR(s)<br>COL Dennis F. Coupe | | 8. CONTRACT OR GRANT NUMBER(s) |
| 9. PERFORMING ORGANIZATION NAME AND ADDRESS<br>U.S. Army War College<br>Carlisle Barracks, PA 17013 | | 10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS |
| 11. CONTROLLING OFFICE NAME AND ADDRESS<br>U.S. Army War College<br>Carlisle Barracks, PA 17013 | | 12. REPORT DATE<br>23 March 1988<br>13. NUMBER OF PAGES<br>37 |
| 14. MONITORING AGENCY NAME & ADDRESS(if different from Controlling Office) | | 15. SECURITY CLASS. (of this report)<br>Unclassified<br>15a. DECLASSIFICATION DOWNGRADING SCHEDULE |

16. DISTRIBUTION STATEMENT (of this Report)

Approved for public release: distribution is unlimited.

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

Newly published Army Rules of Professional Conduct for Lawyers provide ethical guidance and direction for lawyers in military proceedings. The new Rules are the first ever published specifically pertaining to the ethical conduct of military and civilian lawyers practicing in military proceedings. Included in the Rules is a clarification of the ultimate ethical duty of staff judge advocates to the Army and the governmental client, a duty that is superior to duties owed to immediate commanders. Nevertheless, local commanders are

(Continued)

DD FORM 1 JAN 73 1473 EDITION OF 1 NOV 65 IS OBSOLETE

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

Item 20. Con't.

entitled to the same full confidentiality and protection as the Army, so long as they perform official acts lawfully and no conflict of interest arises. By clarifying the proper relationship among staff judge advocates, commanders and the Army client, the Rules strengthen professionalism among the parties.

TABLE OF CONTENTS

# INTRODUCTION

On June 3, 1987, after two years of staffing by Army and joint service legal representatives, The Army Judge Advocate General (TJAG) approved "Rules of Professional Conduct for Lawyers" (ARPC).[1] The new ethical rules became effective on October 1, 1987, and were published on December 31, 1987, as Department of the Army Pamphlet 27-26. The ARPC are the first set of consolidated ethical requirements, guidelines and commentary drafted specifically for Army lawyers and for civilian lawyers who appear in Army legal proceedings.[2]

Since the origins of the Judge Advocate General's Corps in the Continental Army of 1775, military and civilian lawyers appearing in military proceedings followed the ethical rules of the civilian bar. Uniformed lawyers were bound by the ethical standards of their respective states notwithstanding the military nature of the proceedings. The absence of formal ethical standards for practice before courts-martial or other military legal proceedings was probably attributable to the hybrid, lay-professional nature of lower levels of courts-martial prior to enactment of the Uniform Code of Military Justice in 1950.[3] Indeed, non-lawyer counsel continued to appear in lower levels of courts-martial until promulgation of the 1969 Manual for Courts-Martial.[4]

In the past twenty years, military legal proceedings grew increasingly complex with respect to both procedural and

substantive requirements. The practice of military law expanded from five major areas - criminal, international, administrative/claims, contracts and legal assistance - to a multitude of specialized requirements ranging from labor relations and environmental law to copyright/patent, tort litigation and information law. With this dramatic growth in the need for legal representation, the scope of legal advice from staff judge advocates (SJA) to military commanders also widened. As a result, commanders and their lawyers are seeing more of each other today than in the past. Command decisions are more likely than ever before to involve legal issues, either directly or indirectly. The broader range of the SJA-command relationship underscores the need for clear ground rules, in order to ensure that no misunderstandings exist as to the limits of the relationship.

This article focuses on one of the new ethical rules, ARPC 1.13, "Army as Client." The provisions of this rule identify the Army as the primary client of command lawyers and staff judge advocates. Client loyalties and duties to protect confidential communications of the client are extended first and foremost to the Army, and only derivatively to commanders and other authorized representatives of the Army. The view taken in this article is that ARPC 1.13 clarifies a basic, but sometimes not fully understood principle that must govern professional relationships among commanders, command lawyers and their mutual employer, the U.S. Army: duties of public office - to the

Constitution, the rule of law and the government - must prevail over conflicting personal interests.

Before considering the terms and implications of Rule 1.13 in more detail, it will be useful to review the general intent in promulgating the Rules and the basic ethical considerations of public service, for both military officers and lawyers, which led the drafters to emphasize the paramount duty to the institutional client and to the law.

Drafter's Intent

Prior to issuance of the ARPC, published ethical guidance for military and civilian lawyers in Army legal proceedings was limited to (1) the ethical rules of general application to all lawyers upon bar admission by their state or federal licensing authorities,[5] and to (2) various laws, regulations, Executive orders and opinions addressing ethically related behavior in particular types of legal or illegal activity.[6] State ethical codes compare closely with ethical guidelines developed by the American Bar Association (ABA). After the ABA drafted a revised model for ethical rules in 1983, some states adopted the new ABA Model Rules, some elected to retain the older ABA Model Code and others preferred to continue studying the newer Rules for possible adoption.[7] Military lawyers from State X, practicing in an Army proceeding in State Y, looked to the older ABA Code by Army Regulation, but were left somewhat uncertain about the effects of any variances in the state ethical codes. Neither the ABA nor

the state ethical rules and guidance address themselves to specific conditions of military practice. The 1983 ABA ethical revisions provided the impetus for a joint service effort to revise the new ABA Model Rules and to adapt them to legal practice in the armed services.[8]

Service unique laws, Executive orders, regulations and procedures can create correspondingly unique ethical situations.[9] Because the ethical rules developed by the ABA, by the states and even by the Federal Bar Association (FBA) generally do not distinguish between civilian and military practice, a need existed for a consolidated set of rules, guidelines and examples of ethical conduct tailored to the specialized military setting. The ARPC are intended to meet this need.

Although designed to be autonomous, the ARPC rest heavily upon the framework of the ABA Model Rules. The more relevant and more specific ethical guidance in the ARPC provides a better basis for self-assessment and clearer notice of the standards to be applied by The Judge Advocate General in exercise of his express and implied administrative/disciplinary powers under Articles 6, 26, 27, 36, 38 and 42 of the Uniform Code of Military Justice,[10] Rule for Court-Martial 109,[11] Army Regulation 27-1,[12] in addition to the ARPC themselves.[13]

A failure to comply with the ARPC is a basis for invoking the disciplinary process, but does not, in itself, create a legal right or cause of action for any third party, including clients. Accordingly, no collateral claim or basis for relief necessarily arises from a disciplinary violation of the ARPC.[14]

The overriding intent in developing the ARPC was to enhance the high, but sometimes inadequate ethical standards applicable to Army practice. The abilities of state bar or judicial authorities to investigate allegations of ethical impropriety reported from extra-jurisdictional, military forums vary considerably. Where allegations do not involve criminal matters or more serious questions of moral turpitude, some state authorities may not feel as compelled to conduct the often expensive investigations and hearings that would normally occur. There are too few Army cases to form definite conclusions, but the reaction of some local authorities to referrals from the Army suggests use of a cost-benefit, interest analysis to decline or limit investigations of allegations of impropriety arising in military proceedings. State authorities are often unfamiliar with military requirements or procedures. If no in-state complainant or particular state interest is involved, there may be an understandable tendency to limit inquiries, hold ex parte proceedings, and impose minimal sanctions. When the referred allegation has a foreign country situs, local reticence to sanction may increase still further. As noted in Department of Army Pamphlet 27-173, Trial Procedure, state ethical standards are the minimum acceptable requirements and "reflect jurisdictional compromises...each licensing jurisdiction is ultimately free to strike its own balance between competing norms...and the relative power of specific interest groups in that jurisdiction."[15]

The Preamble to the ARPC (see Appendix A) describes the roles of a lawyer as "...a representative of clients, an officer of the legal system, and a public citizen having special responsibility" for the improvement of justice by virtue of his or her license to practice law.[16] Such responsibilities - to clients, to the courts, to the law and to the improvement of justice - are "usually harmonious."[17] The additional roles that uniformed lawyers have as commissioned military officers, to their oaths of office and to their military supervisors, are compatible except in the rare circumstance where a conflict occurs between what the law requires and what a military representative may do, insist upon or require of the lawyer. A key aspect of the ARPC is the guidance provided on the dovetailing professional obligations of uniformed legal officers, both as lawyers obligated to the ethical standards of their licensing jurisdictions and as military officers obligated to obey the law.

The Preamble and Scope of the ARPC recognize that lawyers who practice in military proceedings, especially military lawyers who represent the U.S. Government, can encounter ethical situations unknown to private practitioners. Probably the most common examples arise from the multifaceted responsibilities of commanders of both major units and activities, such as commanders of both divisions and installations. Commanders at these senior levels and higher act as quasi-judicial officials for military justice purposes and as decision making Army representatives for a variety of administrative actions with legal consequences, in

addition to being concerned with their traditional priority: preparation for combat success through necessarily authoritarian means. Identification of the commander's role becomes critical to both the command legal advisor and the commander in order to avoid such problems as inadvertantly unlawful command influence in military justice matters.

Should commanders be considered legal clients of SJAs in the traditional sense, the same as the client of any lawyer and to the same extert as the Army client? More specifically, should the duties and loyalties owed by the lawyer to the client, and the privileges and confidences of the lawyer's client be the same for the commander as for the Army and the U.S. Government, when the client is the commander and the lawyer is a command lawyer, both of whom are subject to their oaths to support the Constitution? Relatedly, what are the duties of SJAs and other command lawyers if conflicts occur between the personal interests of commanders and the interests of the Army and the U.S. Government? Before examining the approach taken by ARPC 1.13 to these questions for command lawyers, it would be useful to review the broader ethical environment, that of professional military officership. The position taken by ARPC 1.13 is that the ethical obligations of military lawyers in advising their commanders are logical and necessary extensions of the same ethical obligations that apply to all military officers.

## Our Common Ethical Responsibilities

"The moral is to the physical as three is to one."

Napoleon Bonaparte

One might ask why, with an abundance of rules, standards, customs and laws already guiding military officers in their conduct, is it necessary to promulgate yet another such rule? The short answer is that the SJA-Commander relationship is a close one, combining professional and personal factors, to such a point that a potential exists for misunderstandings. Surely command lawyers should know precisely how to deal with unlawful command actions. With role clarification comes additional protection for the government, additional deterrence for the potential lawbreaker, and additional assistance for staff judge advocates representing the government through its Army agents. A more explanatory answer requires a review of the common ethical environment - whether soldier, lawyer or civilian.

Ethical issues are at the core of the human condition, ever confronting us in our lesser or greater roles, whether we be princes or paupers, preachers of politicians, citizens or soldiers.[18] To be involved with society is to grapple with the difficult ethical choices of an imperfect world. In their most basic terms, the choices are about doing the right thing for the right reason, rather than acting selfishly; about coming to understand that serving the public good ultimately serves self-interests; about perceiving and objectively assessing the effects

of our actions; about trying to leave our world a bit better than when we came into it, instead of ignoring the problems of others.

The extent to which laws and codes can change ethical attitudes is a much discussed subject. What is beyond serious dispute is that ethical thought and careful formulation of ethical standards have a salutory effect on action.[19] Setting down what is and what is not acceptable increases ethical awareness and sensitivity. Objective standards cut against our tendency to rationalize for the sake of purely personal benefits. Knowing there are rules, sanctions for violations, and effective enforcement procedures, we reduce our incidents of misconduct, whether due to heightened ethical consciousness and reformation or to pragmatic concern for self-preservation.

As an institution, the military sets great store by sound ethical behavior. Military leaders live in a closely structured, almost cloistered environment and their concern for morality, self-sacrifice and the justness of their cause has an ecclesiastical quality. Professional ethics are the most critical aspect of Army leadership. Shortfalls in character traits are generally career terminators.

Knowing that strong ethical values are indispensible to the teamwork and trust needed to lead effectively, senior military leaders regularly speak and write about the importance of integrity, selflessness, moral courage and the like. Even our obligation to be competent has an ethical dimension.[20] Emphasis on ethical behavior continues throughout ones military career as

an officer. A comprehensive review of what has been written about the ethics of officership would take years of study. In 1987 alone, the Army published three new publications on leadership and related ethical issues.[21] The courts have acknowledged the special trust, confidence and responsibility of military officers.[22]

Virtually all experienced Army officers recognize the wisdom of civilian control of our government, the Madisonian division of powers, and the need for checks and balances among the three branches of government. Most soldiers are comfortable with both their commitment to soldiering and their oath to support the Constitution, notwithstanding the perceptions of some military commentators who are troubled by "careerism," loss of "warrior spirit," or inadequate appreciation of Constitutional principles.[23] On balance, soldiers are driven by a conviction and principle rising above self, bonding them to an institution that puts great value on ethical behavior.

It is well to bear in mind that the structure of military life affords military leaders greater insulation from certain ethical pressures that can be more acute in private life. Military leaders are not directly answerable to an electorate or balance sheet. They are result oriented, to be sure, but their fixed salaries and retirement benefits remove them from some of the income-associated stresses of more conventional occupations. The institutional concern for ethical behavior and a plethora of standards of conduct, service policies, procedures, orders, regulations, laws and an officer's oath to the Constitution - all

designed to protect against abuse of powers - stake out a well-marked trail around many behavioral pitfalls. Professional choices for the military are channeled by the law to a greater degree than for many in the private sector. Even in combat, rules of engagement shape military decisions. Finally, it should be remembered that the basic military mission carries with it a higher obligation for ethical accountability. In the midst of democracy, military leaders are entrusted with an autocratic power to direct, to judge, to punish, to restrict liberty and to send others to their deaths, if necessary. Military leaders at the higher levels have the potential to influence decisions that affect our very survival as a nation.

Distinguishing military duties from conventional private norms is not meant to imply that military ethical pressures are any less intense. On the contrary, the consequences of ethical failings by military leaders are usually more serious, for reasons that are obvious. Mission accomplishment can make a commander as keyed to production as any salesman trying to meet a monthly quota. General (USA, Ret) Cavazos often speaks about the periodic "halo polishing" necessary to preserve ethical sensitivities, the need to look for the ramifications of decisions, and the need for a consistency in applying ethical norms to daily decisions. VADM (USN, Ret) Stockdale believes that, "Every significant decision a senior leader makes is a moral one, with implications for the commitment of money, time and/or lives."[24] General Art Brown, the current VCSA, urges officers to

recall that their treatment of subordinates, even in apparently routine matters, can have long term, unforeseen consequences, far beyond what the leader may intend.

Most military officers reach an easy consensus on common ethical standards of behavior. One does not survive without them. The trick is applying the agreed upon theoretical standards to subtle, real world scenarios, where rights and wrongs are not always neatly discernible, choices are limited to degrees of imperfection, and reasonable compromise are sometimes the only way to participate meaningfully. Hence, notwithstanding the general agreement of all military officers on basic ethical norms, opinions often vary on how those norms should be applied in practical decision making. To the extent that there is controversy on the application of ethical norms among senior leaders, the case is strengthened for more ethical study and the formulation of well considered guidelines that reflect realistic standards of ethical behavior. With these thoughts in mind, the need for ethical standards designed specifically for legal practice in the military is more apparent.

## ARPC 1.13: The SJA-Command-Army Relationship

Rule 1.13, ARPC (Appendix B), provides that Army lawyers, other than those who are specifically assigned to individual defense or legal assistance duties, represent the Department of the Army, "acting through its authorized officials." "Authorized officials" include "commanders of armies, corps and divisions,"

and the heads of other Army activities, such as installation commanders. Rule 1.13 further provides that the confidential, lawyer-client relationship that exists between a command lawyer and the Army client may extend to commanders, so long as the commander acts lawfully on behalf of the Army and the matters discussed with the command lawyer relate to official Army business.[25]

The attorney-client privilege encourages full and free communication between an attorney and his or her client by requiring the attorney to keep in confidence information relationg to the representation. An attorney may not disclose such information except as authorized by applicable rules of professional conduct. Typically, disclosures are authorized to avert certain crimes or frauds on the court and as appropriate for proper representation. Hence, identification of the client, as between an organization and an individual agent of the organization, is crucial to attachment of the privilege.

If it becomes apparent to a staff judge advocate that a commander is engaged or has engaged in illegal command action, or intends to take illegal action knowingly in a situation reasonably imputable to the Army, the staff judge advocate must proceed "in the best interests of the Army." Measures to be considered by SJA's facing these unusual situations include (1) advising the commander of the potential illegality and the conflict with Army interests; (2) asking the commander to reconsider; (3) requesting permission to seek a separate legal opinion or decision on the

matter, and (4) referral to the legal authority in the next higher command.[26]

No identical provision to Rule 1.13 exists in private sector ethical codes.[27] The Rule is based on the well-established, fundamental notion that the true client of command lawyers is the Army, in the first instance, and ultimately the laws and Government of the United States. Three related tenets are involved in Rule 1.13: (1) the sworn duty of all Army officers to support the Constitution and the system of laws and government expressed therein; (2) the extension of our Constitutional allegiance to the U.S. Army, through DoD and the Executive Branch; and (3) the recognition that our ultimate loyalties to the Constitution, public service and our at-large governmental employer must prevail over any conflicting personal interests that may arise.

The significance of Rule 1.13 lies more in what the Rule says about the tripartide, SJA-commander-Army relationship than in the guidance the Rule provides on how to cope with aberrational[28] cases of intentionally illegal conduct by senior commanders:

> (a)...
> When a judge advocate or other Army lawyer is... to provide legal services to the head [commander] of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head [commander] of the organization as to matters within the scope of the official business of the organization. The head [commander] of the organization <u>may not invoke the lawyer-client privilege or the rule of confidentiality</u> for the [commander's] own benefit but may invoke either for the benefit of the Army. In so invoking... on behalf of the Army, the [commander] is subject to being overruled by higher authority in the Army. (emphasis added)[29]

The Comment to Rule 1.13 (Appendix B) elaborates on the relationship:

> The Army and its commands, units and activities are legal entities, but cannot act except through their authorized officers.... A judge advocate...normally represents the Army acting through its officers.... It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibiilty exists... (emphasis added).[30]

The Comment goes on to say that official lawyer-commander communications are protected by confidentiality (Rule 1.6), but:

> This does not mean, however, that the officer... is a client of the lawyer. It is the Army, and not the officer...which benefits from Rule 1.6 confidentiality (emphasis added).[31]

Prior to promulgation of Rule 1.13 and the ARPC, there was "no clear statutory, regulatory or ethical guidance" defining the nature of SJA-commander-Army relationships in terms of client loyalty and privilege from disclosure.[32] Few problems arose because a high degree of professionalism characterized relationships between SJAs and senior commanders. Occasionally, however, confusion arose from loose distinctions between personal and institutional loyalties, and between a right to privacy for personal disclosures or secrets, and protected lawyer-client privileges. Ambiguous language in a now superseded Department of Army Pamphlet[33] contributed to the mistaken notion among some that a staff judge advocate's loyalty to a commander ought to be an all-or-nothing, undivided, right-or-wrong commitment, to the exclusion of other loyalties, just as attorney-client loyalties

are often described. Of course, limits exist on the duties and loyalties of lawyers to their clients, whether personal or institutional. Representation of any client must be zealous, but within ethical and legal bounds.[34]

As critical as personal loyalty is, the proposition that loyalty to a personal interest is an absolute requirement that ought to prevail over loyalty to the law has been so thoroughly rejected that it bears little discussion.[35] In his book, Limits of Loyalty, A. C. Wedemeyer describes the predicament facing many senior German officers in World War II:

> Colonel General Beck...General Rommel and thousands of other patriotic Germans in the military service were...torn between loyalties to those in power and their innate loyalties to principles of decency and justice...there was a duty, in Rommel's view...of loyalty to the nation which now came into conflict with the duty to the commander.[36]

General George Marshall went a step further, saying that, "[A]n officer's ultimate, commanding loyalty at all times is to his country and not to his service or superiors."[37] Similarly, the Code of Ethics for Government Service in the current Army Regulation 600-50 requires that:

> Any person in government service should:
>
> a. Put loyalty to country above loyalty to persons...
>
> b. Uphold the Constitution, laws and regulations of the United States...ever conscious that public office is a public trust.[38]

The courts have recognized these same principles as applicable to military officers.[39]

The occasional confusion over the attorney-client privilege and the appropriate object of a command lawyer's loyalty make it apparent that ethical "rules of engagement" for lawyers needed to be precisely defined. Implicit in Rule 1.13 is the requirement that both commanders and their staff judge advocates obey their fiduciary duties to the law, as representatives of the Army, to honor their oaths to the Constitution. So long as this duty is met and there is the recognition that public office equates to a public trust that the offices will be exercised lawfully, commanders are entitled to expect both confidentiality and loyalty from their lawyers. Whether that confidence is extended to commanders from the Army, as "quasi-clients"[40] of the command lawyer, or simply as protection for matters conveyed in the expectation of privacy, SJAs have an ethical duty not to disclose such communications to those who have no legitimate right to know. The fact that the Army and the government and, when relevant to trial issues, opposing counsel and the courts have a right to know of evidence of illegalities or conflicts of interest does not detract from, but bolsters the professionalism of the relationship. If the parameters of the SJA-commander representation are left unclear and a potential conflict or illegal action occurs, the commander/advisee may expect personal representation from the SJA and sense that his lawyer is merely attempting to extricate himself from association with the commander in the commander's hour of need. Clear rules and bilateral understanding of those rules at the outset leave no room for the development of such misunderstandings.

The drafters of Rule 1.13 understood well that commanders must have the support of their lawyers and must be free to discuss with their staff judge advocates any aspect of official business fully frankly and with the assurance of confidentiality, except as to those higher authorities who have a legitimate right to disclosure. The Comment to the Rule states:

> When the officers...make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.[41]

Thus, Rule 1.13 changes nothing of substance. The Rule merely clarifies an area of potential misunderstanding and provides a structure for addressing representational conflicts. No well-intentioned commander need hesitate to discuss any command option, power or duty with his or her SJA. Providing advice on such matters is the bread and butter of the SJA's job. Subject to the narrow exceptions required by law and the ethical rules, as described above, no third party disclosures of a commander's private communications are appropriate. Only a clearly intended or actual illegality, or a clear conflict of governmental interest, is to be disclosed under Rule 1.13. Only those who insist upon proceeding against Army/governmental interests lose their derivative protections from disclosure.

Rule 1.13 also notes that SJAs facing a conflict of interest, e.g., an intentionally illegal act by a commander, may refer the matter to higher authority in the technical chain, or ask for guidance therefrom. This provision merely reflects a right that already exists in Article 6(b), UCMJ.

The same basic principle that governs SJA-commander relationships also applies to subordinate command representatives and other command lawyers. If an illegal action is insisted upon and cannot otherwise be deterred, it should be brought to the attention of the higher commander or supervising command lawyer.

The ARPC integrate, cross reference and extend the provisions of Rule 1.13 in several of the other rules, wherever appropriate to clarify the nature of the ethical duty described. Comment in ARPC 1.4, "Communication," requires that appropriate Army officials be kept informed of legal developments on behalf of the Army client. Comment to ARPC 1.6, "Confidentiality of Information," notes that lawyers who represent the Army may inquire within the Army to clarify the possible need for withdrawal from representation of local officials where doubt exists about contemplated criminal conduct. Rule 1.7, "Conflict of Interest," includes the following comment:

> Loyalty is an essential element in the lawyer's relationship to a client....Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests....A client including an organization (see Rule 1.13), may consent to representation notwithstanding a conflict.[42]

Similarly, ARPC 5.4, "Professional Independence of a Lawyer," requires a lawyer to exercise his or her own professional judgment in representing a client, "free of competing influences and loyalties." Lastly, comment in ARPC 8.5, "Jurisdiction," applies the ARPC to the separate roles of

lawyers, whether serving the Army as an institutional client, or serving individual clients as authorized by the Army.

Rule 1.13 recognizes that judge advocates and other Army lawyers are both commissioned officers and "officers of the court," with complementing, but not identical, ethical obligations in each capacity. The approach taken in Rule 1.13 is partially analogous to ABA and FBA guidance on duties of civilian attorneys to their corporate or institutional employers.[43] Rule 1.13 also follows the evidentiary privilege rationale of Military Rule of Evidence 502,[44] "lawyer-client privilege, by recognizing that the 'client'" can be a public entity (and entitled, as such, to claim the privilege of disclosure or nondisclosure of confidential communications of its representatives. The limits on the lawyer-client privilege in the military are somewhat stricter than those which generally apply in the private sector.)

The greatest value of Rule 1.13 is its clarification of respective, official roles and of legal relationship that are occasionally misunderstood. Public servants, and military authorities in particular, conduct their official business through the powers given to them by their government. Commanders and Army lawyers must expect that they may be held accountable for their actions, and should conduct their activities accordingly, mindful of potential scrutiny by judges, by higher authorities in all branches of government, and even by the public at large when the information is not protected from disclosure.[45]

## Conclusion

The Book of Timothy reminds us that laws are not made for the righteous. Yet even for the righteous, the full ethical dimension of decision making is not always obvious. The best of us sometimes fail to realize all the consequences of decisions. All of us can benefit from wise counsel. Well considered laws and codes of behavior alert us to ethical issues which we may not otherwise perceive, and inform us of societal preferences for resolving conflicting and sometimes ambiguous choices in an increasingly complex world. Wise rules of ethical behavior are beneficial norms, serving as a departure point for subjective and objective analysis, stimulating ethical discussion and thought, and conforming behavior to desirable ends.[46] The words of the great German philosopher, Immanuel Kant, echoing similar thoughts of Socrates a millenium earlier, seem particularly appropriate to the development of the ARPC and the clarification of the Army-SJA-commander relationship:

> We should strive to develop good laws and obey them, not because the laws are perfect, but because it is our duty and otherwise there is but chaos....[47]

Official duties should be performed lawfully, in a manner that will bear up under public review even if that review never occurs. The dictates of law, our oath and applicable ethical rules must be observed as self-evident and necessary conditions of public service. Keeping the Army's interests in mind strengthens, rather than detracts from the commander's

entitlement to special care, loyalty and protection from illegality or unwarranted disclosure. By setting the ground rules out clearly, the ARPC fortify an already sound relationship among SJAs, commanders and the Army client.

## APPENDIX A

## DA Pamphlet 27-26 (31 December 1987)

## PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with informed understanding of the client's rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the law and the ethical rules of the adversary system. As negotiator, a lawyer seeks results advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt, diligent and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted by these Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's personal affairs. A lawyer should use the law's procedures only for their lawfully intended purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

Many of a lawyer's professional responsibilities are prescribed in these Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, to exemplify the legal profession's ideals of public service, and to respect the truth-finding role of the courts.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and justice will be served. So also, a lawyer can be sure that preserving client confidence ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of legal practice, however, conflicting responsibilities are encountered. Mostly all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the law and the legal system, and to the lawyer's own interest in remaining an upright person. These Rules of Professional Conduct prescribe guidance for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying these Rules.

## SCOPE

These Rules of Professional Conduct are intended to govern the ethical conduct of lawyers as defined in these Rules. These Rules are intended to be used in conjunction with law which controls the practice of lawyers. Such law includes but is not limited to Army regulations, including Army Regulations 27-1 (Judge Advocate Legal Service), 27-10 (Military Justice), and 600-50 (Standards of Conduct for Department of Army Personnel). The definitive interpretation, implementation, and enforcement of these Rules are the exclusive province of The Judge Advocate General.

While the ABA Model Rules of Professional Conduct were the basis of these Rules, changes to some of the ABA Rules and associated Comment were required to ensure that these Rules met the needs of Army practice. Reasons for the changes include, but are not limited to: an ABA Rule's inapplicability to Army practice; the need for guidance tailored to Army practice; differences in approach to the resolution of specific ethical issues for Army lawyers. In addition, some ABA Rules were omitted. Rules on public interest, for example, were omitted because judge advocates and lawyers employed by the Army already serve the public interest and need no further inducement for such service....

...These Rules presuppose a larger legal context shaping the lawyer's role. That context includes statutes and court rules relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with these Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. These Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. These Rules simply provide a framework for the ethical practice of law.

APPENDIX B

DA Pamphlet 27-26 (31 December 1987)

**RULE 1.13 Army as Client**

(a) Except when representing an individual client pursuant to (f) below, a judge advocate or other Army lawyer represents the Department of the Army acting through its authorized officials. These officials include the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities. When a judge advocate or other Army lawyer is assigned to such an organizational element and designated to provide legal services to the head of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the lawyer-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the Army. In so invoking either the lawyer-client pirivlege or lawyer-client confidentiality on behalf of the Army, the head of the organization is subject to being overruled by higher authority in the Army. The term Army is used in this and related Rules will be understood to mean the Department of the Army or the organizational element involved.

(b) If a lawyer for the Army knows that an officer, employee, or other member associated with the Army is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the Army and the apparent motivation of the person involved, the policies of the Army concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the Army and the risk of revealing information relating to the respresentation to persons outside the Army. Such measures may include among others:

(1) advising the head of the organization that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the lawyer and the lawyer's responsibility is to the organization;

(2) asking reconsideration of the matter;

(3) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the Army; and

(4) referring the matter to or seeking guidance from higher authority in the technical chain of supervision, including, if warranted by the seriousness of the matter, referral to the staff judge advocate assigned to the staff of the acting official's next superior in the chain of command.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act concerning the matter insists upon action, or refusal to act, that is clearly a violation of law, the lawyer may terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

(d) In dealing with the Army's officers, employees, or members, a lawyer shall explain the identify of The Army as the client when it is apparent that the Army's interests are adverse to those of the officers, employees, or members.

(e) A lawyer representing the Army may also represent any of its officers, employees, or members acting on behalf of the Army subject to the provisions of Rule 1.7 and other applicable authority. If the Army's consent to dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the Army other than individual who is to be represented.

(f) A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer-client relationship with that individual.

**COMMENT:**

**The Army as the Client**

The Army and its commands, units, and activities are legal entities, but cannot act except through their authorized officers, employees, and members. The Army's interests may conflict with or become adverse to the personal interests of one or more of the officers, employees, or members. Under such circumstances the question arises as to who is the client. Identifying the client is of great significance to the lawyer because of the ramifications it has on the carrying out of legal and ethical obligations.

For purposes of these Rules, a judge advocate or lawyer employed by the Army normally represents the Army acting through its officers, employees or members in their official capacities. It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists absent assignment or designation by the Army to represent a specific individual client.

When one of the officers, employees, or members of the Army communicates with the Army's lawyer on a matter relating to the lawyer's representation of the organization on the organizations's official business, the communication is protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the lawyer. It is the Army, and not the officer, employee, or member which benefits from Rule 1.6 confidentiality. The Army's entitlement to confidentiality from third parties may not be asserted by an officer, employee, or member to as a basis to conceal personal misconduct from the Army. The lawyer may not disclose information relating to the representation except for disclosures explicitly or impliedly authorized by the Army in order to carry out the representation or as otherwise permitted in Rule 1.6.

When the officers, employees, or members of the Army make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an officer, employee, or member that is in violation of law or directive. In such a circumstance, it may be necessary for the lawyer to ask the officer, employee, or member to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the Army, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by higher authority in the Army. Judge advocates should refer such matters through supervisory judge advocate channels.

A lawyer assigned outside the Department of the Army, such as to a joint or unified command, owes loyalty to that organization. It is to that client that a lawyer's immediate professional obligation and responsibility exists, absent assignment or designation by the organization to represent a specific individual client.

## ENDNOTES

1. 52 Fed Reg. 122 (June 25, 1987) [Hereafter referred to as "Rules" or "ARPC"].

2. The ARPC define "lawyer" as "...a member of the bar... who practices law under the disciplinary jurisdiction of the Judge Advocate General. This includes judge advocates...and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the manual for Courts-Martial...'Tribunal' includes all fact-finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law." See note 25, infra. The "Army" is the immediate subagency of the Department of Defense, an Executive agency. This in no respect limits the ultimate duty to the Constitution, the law, and the three branches of the Federal Government.

3. 64 Stat. 120 (May 5, 1950).

4. Exec. Orders No. 11,430 (1968) and 11,476 (1969).

5. The Army, Navy and Marine Corps agreed on the desirability of promulgating ethical rules with specific guidance for military lawyers. However, the Navy/Marine Corps guidance is less comprehensive, includes no commentary, and is inapplicable to civilian lawyers. The Air Force is studying the need for ethical rules tailored to their service practice. The Court of Military Appeals continues to apply the ABA Model Code, per Rule of Court 12(a), 4 M.J.CI-II (1977). It is hoped that the Army Rules will provide the basis for a more uniform approach among the services and the Court.

6. See, e.g., the "conflict of interest" provisions of 18 U.S.C. s201-209 and the "Ethics in Government" requirements of 5 U.S.C.A. App-I, s 201 et seq (26 Oct. 1978; 13 and 22 Jun. 1979). The primary Army authority for investigation of ethical allegations against lawyers is Dept. of Army Reg. No. 27-1, Legal Services - Judge Advocate Legal Service, para. 5-3 (1 Aug. 1984 (under revision)). See also Dept. of Army Regs. No. 27-10, Military Justice, para. 5-8 (10 Jul. 1987 (under revision)) and 600-50, Standards of Conduct, App. D (25 Sep. 1986). The Federal Ethical Considerations (F.E.C.) of the Federal Bar Association (FBA) are an excellent source of guidance for the federal sector attorney, but are not adapted to military practice. The Army Office of the Judge Advocate General also issues an annual "Reference Guide to Prohibited Atrocities of Military and former military personnel, as a research tool for judge advocates facing statutory requirements related to common ethical problems (DAJA-AL 1987/2666).

7. ABA Model Rules of Professional Conduct, 1983. As of November 1987, twenty-three states had adopted modified versions of the 1983 Model Rules of Professional Conduct. Most other states were still following the older ABA Code, but considering adoption of some version of the 1983 ABA Rules.

8. The possibility of joint service modification of the 1983 ABA Rules to military practice was first proposed in Army cnannels in 1984, by Colonel (USA, ret) William Fulton, the current Clerk of Court for the U.S. Army Court of Military Review. The Army working group representative and primary drafter was MAJ Thomas Leclair, JAGC. The author supervised the Army drafting and joint service coordination.

9. Although the Supreme Court has recognized, in Parker v. Levy 417 U.S. 733, 744 (1973), that, "Military law is a jurisprudence...separate and apart from the law which governs our federal government," such differences exist more outside the courtroom than within. See also, Solorio v. United States, 107 S. Ct. 2924 (June 25, 1987).

10. 10 U.S.C. ss801-940 (1982) [hereafter, UCMJ]. Article 6 (ss 806) provides the fundamental authority of The Judge Advocate General to supervise the administration of military justice, including assignment and direct communication powers. The other articles add to TJAG's powers and responsibilities, either directly or by implication. For example, Art. 38 describes Court-Martial representation by "civilian defense counsel"; Art. 42 refers collectively to "defense counsel"; Art. 27 describes detail and certification of counsel. The Military Justice Act of 1984 did not affect substantially these Articles.

11. Rules for Court-Martial [hereafter R.C.M.] are contained in the Manual for Courts-Martial, United States, 1984, as amended by Exec. Order No. 12473, as amended by Exec. Orders No. 12480 (July 13, 1984), 12550 (February 19, 1956) and 12586 (March 3, 1987); also published at 52 Fed. Reg. 7103). R.C.M. 109(a), building on the UCMJ powers of the Judge Advocates General, provides authority to "govern the professional supervision and discipline" of military lawyers and "other lawyers who practice in proceedings governed by the Code and this Manual." The ARPC refers to lawyers before "tribunals conducted pursuant to the UCMJ and the MCM." This distinction between "proceedings" and "tribunals" is probably without great significance, as both would encompass, e.g., Article 32, UCMJ, and similar hearings. But see CPT James E. O'Hare, "Dealing With Client Perjury Under the Army Rules of Professional Conduct," in "DAD Notes," "The Army Lawyer," Dept. of Army Pamphlet 27-50-179 (Nov. 87) at pp. 34-35. F.E.C. 4-4 of the FBA notes that "In respects not applicable to the private practitioner, the federal lawyer is under an obligation to the public."

12. Dept. of Army Regulation 27-1, Op. cit., supra, note 4, now under revision, describes the procedures for investigation of allegations of professional impropriety, and for imposing discipline, when appropriate.

13. ARPC 5.1, Responsibilities of the Judge Advocate General and Supervisory Lawyers, and ARPC 8.5, Jurisdiction.

14. ARPC, Preamble, supra Appendix A and note 1, at p. 2.

15. Dept. of Army Pamphlet 27-173, Trial Procedure (15 Feb. 1987) contains an excellent discussion of the professional responsibilities of military counsel and notes the pre-ARPC need for guidance on whether the client of the staff judge advocate should be the Army or the commander, at pp. 179-186. An excellent discussion of the ABA approach to extraterritoriality is at p. 180.

16. ARPC, Preamble, supra, note 1, at p. 2.

17. Ibid.

18. See generally, William K. Frankena, Ethics (Chicago: Prentice Hall, 2nd ed., 1973), pp. IX-XI. VADM (USN, ret) James Bond Stockdale notes that "Every significant decision a senior leader makes is a moral one, with implications for commitment of money, time and/or lives." in the Preface to Richard A. Gabriel, To Serve With Honor (Westport, Conn.: Greenwood Press, 1982), p. xvi.

19. See, e.g., Thomas Ehrlich, "Common Issues of Professional Responsibility," The Georgetown Journal of Legal Ethics, Vol. I, No. 1 (Summer 1987), 41. Ehrlich points out that forty-one professional societies have developed ethical rules, and notes benefits from comparative analysis. John A. Rohr, in Ethics for Bureaucrats (New York: Dekker, 1978), at p. 10, observes: "Although one might quarrel with certain self-serving aspects of the codes of ethics developed by the medical and legal professions, there is little doubt that it is the high sense of professional definition among physicians and lawyers that accounts for the relatively clear ethical standards of their professiona" (emphasis added). Dean Derek C. Bok is quoted in Richard A. Gabriel, To Serve With Honor, supra note 15, at 9: "Most men...will profit from instruction that helps them become more alert to ethical issues, and to apply their moral values more carefully and vigorously to the ethical dilemmas they encounter in their professional lives."

20. See, Lewis Sorley, "Competence As an Ethical Imperative," Army (August 1982), p. 42. Sorley argues persuasively that competence is a virtue that subsumes many others.

21. Dept. of the Army Field Manual 22-103, Leadership and Command at Senior Levels; Dept. of the Army Pamphlet 600-80, Executive Leadership (1982); and the ARPC, supra note 1.

22. See, e.g., United States v. Means, 10 MJ 162 (C.M.A. 1981). C. J. Everett notes that, "In light of the unique special position of honor and trust enjoyed by an officer...it is quite understandable why the President determined that an officer should only be sentenced to confinement by the highest military court."

23. See R. Gabriel, supra note 15, pp. 119-129.

24. Ibid., p. 9. For a comprehensive legal and comparative analysis of military necessity contrasted to "normal" exercise of liberties see James Hirshorn, "The Separate Military Community: Military Uniqueness and Servicemen's Constitutional Rights," 62 North Carolina Law Review 2 (1964), 1.

25. Disclosures or nondisclosures of confidences may be analyzed from at least four perspectives: (1) what evidiatiary rules or court orders require as a matter of discovery for a fair trial of an accused; (2) what ethical rules require to preserve the confidences of clients; (3) what is requred by the Freedom of Information and Privacy Acts, and (4) what is morally required by personal expectation or commitment? Distinguishing disclosure issues according to each of these categories is helpful to analysis of particular questions. Discovery and ethical disclosure obligations are summarized in Dept. of Army Pamphlet 27-173, Trial Procedure (15 Feb. 1987), paras. 30-5 and 30-6, pp. 187-192. Multiple clients with conflicting interests are prohibited by the Cannon 5 of the ABA Code.

26. ARPC 1.13(b)(1)-(4).

27. ABA Model Rule 1.13(b) "Organization as Client" and Federal Ethical Consideration 4-1 of Cannon 4, FBA Rules, were models for ARPC 1.13, but do not reflect unique aspects of the SJA-commander relationship.

28. In an unpublished report, "Legal operations in the European Theater during World War II," by LTC Joseph W. Riley, U.S. Army, JAGC, it is interesting to note that problems between SJAs and commanders are considered virtually nonexistent. See, "Legal Questions Arising in the Theater of Operations" Study No. 87 (unpub. 1947), on file in the Army Library, Headquarters, Department of Army.

29. ARPC 1.13(a) and Comment. Dept. of Army Pamphlet 27-173, supra note 20, pp. 184-185, discusses the SJA-commanding general relationship prior to the ARPC. In United States v. Albright, 9 C.M.A. 628, 26 C.M.R. 408 (1958), the roles of the SJA were alternatively described as "advisor on legal matters," "chief spokesman for the commander," "legal conduit" and wearer of "judicial robes" when reviewing criminal charges and records of trial.

30. ARPC 1.13(a) and comment.

31. Ibid.

32. CPT Lawrence Gaydos, "The SJA as the Commander's Lawyer: A Realistic Proposal," The Army Lawyer, Aug. 1983, p. 14.

33. Dept. of Army Pamphlet No. 27-5, Staff Judge Advocate Handbook, para. 19b (July 1963): "He [the commander] does want a legal advisor whose loyalty is unquestioned."

34. Model Code of Professsional Responsibility Cannon 7 (1900); ABA Model Rules 1.6 and 3.3. See also, Nix v. Whiteside, 106 S. Ct. 988 (1986). Geoffrey C. Hazard, Jr., "Nature of Legal Ethics," 1 Georgetown Journal of Legal Ethics, 43, at pp. 67-84, Prof. Hazard makes a persuasive case that the ABA Model Rules on confidentiality (1.6) represent an unsuccessful attempt "to create an island of refuge in the legal sea of integrity and to establish a pirate's cove of confidentiality." For this and other reasons, the ARPC impose a clearer duty upon attorneys to disclose future crime under ARPC 1.6, 1.13 and 3.3, than exists under the ABA Model Rules. Hazard also makes a compelling argument that the conduct of a client is "the ultimate source of ethical issues for a lawyer." According to Hazard, unless there is ethical association with the legal actions of a client, "the administration of law becomes a sporting contest...with lawyers manufacturing rights for clients that do not exist and erasing duties that do," at 83. But see, A. Wasserstrom, "Lawyers as Professionals," 5 Human Rights Law Review, 1 (1975) for a contrary view. The question of how to deal with client perjury under the ARPC is addressed in "USALSA Report, DAD Notes," The Army Lawyer, Nov. 1987, p. 34.

35. See e.g., J. Sorley, "Duty, Honor, Country: Practice and Precept," in M. Wakin, War, Morality, and the Military Profession (Boulder: Westview, 2d ed., 1986), p. 141: "The essence is loyalty...to ideals that transcend self." Accord, Philip Flammer, "Conflicting Loyalties and the American Military Ethic, in M. Wakin, supra this note, p. 165: "[T]he military ethic calls for ultimate loyalty to cause and principles higher than self...loyalty demands a firm will to justice and truth." Wakin himself observes, "It is no longer the case that extreme value is placed on personal loyalty to a commander; that aspect of military honor is transferred to the oath of office which requires allegiance to the Constitution," supra this note, p. 185. See also, T. Reese, "An Officer's oath," Military Law Review, 25 (July 1964): "The purpose of the [officers] oath...is to affirm devotion to the Constitution and the Government," p. 2.

36. A.C. Wedemeyer, reported by P. Hoffmann in Limits of Loyalty (Ontario: Wilfred Laurier Press, 1980), p. 125.

37. Richard A. Gabriel, To Serve With Honor, supra note 15.

38. Dept. of Army Reg. No. 600-50, Standards of Conduct, App. D (Sep. 26, 1986).

39. See, e.g., United States v. Scott, 21 M.J. 345 (C.M.A. 1986). Commenting on Article 133, UCMJ, ("conduct unbecoming"), Judge Cox states in his concurring opinion: "It [Article 133] focuses on the fact that an accused is "an officer" and this conduct has brought discredit upon all officers and, thus, upon the honor, integrity, and good character inherent in that important, unique status."

40. The term "quasi-client" is attributed to G.C. Hazard, Jr., "Ethics in the Practice of Law," Journal of Human Rights (Fall 1978), p. 44. Prof. Hazard also provides a useful model for analysis of the SJA-Commander-Army relationship in "Triangular Lawyer Relationships: An Exploratory Analysis," 1 Georgetown Journal of Legal Ethics, supra note 31. The term "derivative client" also has been used.

41. ARPC, Comment to Rule 1.13, p. 19.

42. ARPC, Comment to Rule 1.7, p. 12.

43. See notes 4, 9 and 20, supra.

44. M.R.E. 502, Manual for Courts-Martial, United States, 1984, supra note 9.

45. "Interagency" communications and attorney client predecisional memoranda are generally exempt from mandatory disclosure under the Freedom of Information Act, 28 U.S.C. ss ss 1346(b); 2671-1680 (1982).

46. "Our central problem is...an obtuseness in refusing to see basic choices among incompatible ends [when we are] unable to agree on normal or prudential norms," according to Lance Leebman, "Legislating Morality in the Proposed CIA Charter," Public Duties: The Moral Obligations of Government Officials, (Boston: Harvard U. Press, 1981), p. 248. The editors of the Georgetown Journal of Legal Ethics, supra note 31, note: "The need for considered reflection about the ethical issues lawyers confront in daily practice is great," p. ii (Summer 1987). R.B. Stewart, in "The Reformation of American Administrative Law," 88 Harvard Law Review 8 (June 1985), p. 28, notes the "astonishing capacity for rationalization" that exists when professional environments are left "morally ambiguous."

47. I. Kant, "In Critique of Practical Reason" (1788) Summarized in The Encyclopedia of Philosophy, Vol. 4 (Macmillan, 1967) pp. 317-322, and W.B. Gallie, Philosopher of Peace and War (New York: Cambridge U. Press, 1978), pp. 36-58.

END

DATE

FILMED

5-88

DTIC